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# In the Supreme Court of the United States

OCTOBER TERM, 1956

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JOSEPH F. BLACK, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION (DALLAS REGION), INTERNAL REVENUE SERVICE, PETITIONER [1]

*v.*

MAGNOLIA LIQUOR COMPANY, INC.

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***PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT***

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**J. LEE RANKIN,**
*Solicitor General,*
**VICTOR R. HANSEN,**
*Assistant Attorney General,*
**DANIEL M. FRIEDMAN,**
*Attorney,*
*Department of Justice, Washington 25, D. C.*

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## CITATIONS

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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The Solicitor General, on behalf of the Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on April 6, 1956.

## OPINION BELOW

The opinion of the court of appeals (Appendix, pp. 12–22) is reported at 231 F. 2d 941.

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[1] The respondent in the court below was Claud B. Cooper, petitioner's predecessor in office. By order of August 18, 1956 (Appendix, pp. 23–25), the court substituted petitioner for Mr. Cooper, *nunc pro tunc*, as of February 1, 1954.

## JURISDICTION

The judgment of the court of appeals (Appendix, p. 22) was entered on April 6, 1956. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black on July 2, 1956 to September 3, 1956 (Appendix, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act, which prohibit a wholesaler of distilled spirits from requiring or inducing any retailer to purchase distilled spirits "to the exclusion in whole or in part" of such spirits sold or offered for sale by other persons, prohibit tie-in sales by wholesalers.

## STATUTE INVOLVED

Section 5 of the Federal Alcohol Administration Act, 49 Stat. 977, 27 U. S. C. 205, provides in pertinent part:

> UNFAIR COMPETITION AND UNLAWFUL PRACTICES
>
> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:
>
> (a) *Exclusive outlet.*
>
> To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any

such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) *"Tied house."*

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * or (7) by requiring the retailer to take and dispose of a certain quota of any such products; * * *.

STATEMENT

In February, 1952 the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division, Internal Revenue Service, issued an order (App. 34–39[2]) directing respondent (a liquor wholesaler) to show cause why its wholesaler's basic permit should not be suspended for having made tie-in sales between December 1, 1950 and March 31, 1951, in alleged willful violation of Sections 5 (a) and 5 (b) of the Federal Alcohol Administration Act.[3] After hearing, the examiner found that respondent had violated the Act by making such tie-in sales, and recommended that its permit be suspended for 45 days (Supp. App. 3–156). On appeal, the Director of the Division approved and affirmed (with certain modifications) the examiner's findings,[4] but reduced the period of

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[2] "App." and "Supp. App." refer to the appendices filed with the court of appeals.

[3] Section 4 (e) of that Act authorizes the Secretary of the Treasury to suspend or revoke basic permits for willful violation of the Act. By Treasury Department orders and regulations, the Secretary has delegated his authority. Under his regulations (26 C. F. R., Part 200), suspension or revocation proceedings are decided initially by the hearing examiner. If the Assistant Regional Commissioner agrees with that decision, he enters an order in accordance therewith. If he disagrees, he may file a petition for review with the Director of the Alcohol and Tobacco Tax Division, who may affirm, modify or reverse the examiner's decision. (The respondent similarly has a right of appeal to the Director.) The Assistant Regional Commissioner then enters an order in conformity with the Director's decision.

[4] The order to show cause also charged, and the examiner found, that respondent had knowingly and willfully made false entries in certain of its records. The Director reversed this finding, on the ground that such errors had been negligent rather than intentional (App. 242–245).

suspension to 15 days (App. 224–247), and the Assistant Regional Commissioner issued an order suspending respondent's permit for that period (App. 222–223). The court of appeals set the order aside on the ground that tie-in sales are not prohibited by the Act.

The pertinent facts, as found by the examiner and approved by the Director, are as follows:

Respondent is the exclusive distributor for Seagram's products in the New Orleans area (Supp. App. 77). It does an annual business of $6,000,000, and has 2500–2600 customers (Supp. App. 76). Between December 1, 1950 and March 31, 1951 (the period covered by the complaint), V. O. Whiskey and Johnny Walker Scotch were in short supply (Supp. App. 77–80), Seagram's Ancient Bottle gin was a poor seller but plentiful (Supp. App. 92), and Seagram's 7-Crown Whiskey also was plentiful (Supp. App. 80). In order to increase its sales of Seagram's gin and 7-Crown, respondent "adopted and executed a policy" of requiring its retail customers to purchase the latter, which they did not desire, in order to obtain V. O. or Johnny Walker, which they "desired and needed" (Supp. App. 79); and such tie-in sales were made "to such an extent as substantially to restrain or prevent transactions" in interstate or foreign commerce in distilled spirits (Supp. App. 96).

In holding that the Act does not prohibit tie-in sales, the court of appeals expressly refused to follow the contrary holding of the Court of Appeals for the Second Circuit in *Distilled Brands* v. *Dunigan*,

222 F. 2d 867. The court below declared that since the Act authorizes suspension or revocation of permits for violations it is penal in nature and to be construed "strictly against the Government." The court also relied on the following: that the Act was passed shortly after the National Industrial Recovery Act was held unconstitutional; that it was adopted in order to plug the resulting regulatory gap; that the NRA Alcoholic Beverage Codes had not prohibited tie-in sales; and that the House Committee Report on the Act stated that it "embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact." The court noted the Government's contention that since 1946 the Treasury Department had construed the Act as prohibiting tie-in sales—a factor given weight in the *Distilled Brands* case—but it found that contention unpersuasive because of a 1947 letter by the Secretary which, in proposing legislation that would have specifically outlawed tie-in sales, indicated that in 1946 the Department had had "doubt" whether tie-in sales were covered. The court pointed out that this letter had not been called to the court's attention in *Distilled Brands*.[5]

## REASONS FOR GRANTING THE WRIT

1. The decision below that tie-in sales are not prohibited by Sections 5 (a) and 5 (b) of the Fed-

[5] In view of its decision on the statutory question, the court below found it unnecessary to reach other grounds for reversal urged by respondent.

eral Alcohol Administration Act directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Distilled Brands* v. *Dunigan*, 222 F. 2d 867. In *Distilled Brands,* the court unanimously held (p. 869) that tie-in sales "do constitute a sufficient interference with competition to require prohibition within the regulatory scheme" of the Act, and that Section 5 "actually covers such transactions." The court stated (*ibid.*) that tie-in sales have a twofold restraint on commerce: "The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market." The two aspects of the tie-in sale, the court pointed out, are dealt with separately in Section 5 (a) (the excluded seller) and Section 5 (b) (coercion of the buyer). The court also noted that both sections "explicitly state that the forbidden practices need not result in complete exclusion of competitive sellers, but that partial interference will suffice." *Ibid.*

We submit that the court below erred in holding that tie-in sales are not prohibited by the Act. The court's conclusion that the Act was not intended to go beyond the prohibitions in the NRA Codes ignores the significant difference in language between the Codes and the Act. For example, the Codes prohibited the practice of requiring a retailer to handle only the products of a particular seller—an exclusive dealership. The Act, however, broadened this pro-

vision to make it illegal to require or induce a dealer to purchase any distilled spirits "to the exclusion in whole or *in part*" (emphasis added) of distilled spirits sold or offered for sale by other persons in interstate commerce. A wholesaler who requires or induces a retailer to purchase on a tie-in basis thereby excludes "in part" distilled spirits sold or offered for sale by competing wholesalers.

The legislative history supports this construction of the Act. The Federal Alcohol Administration Act, like the Clayton Act, was intended to "prevent * * * monopolies and restraints of trade" (though, of course, in a much narrower area) ~~industry~~ by striking at their causes "in their incipiency." H. Rep. 1542, 74th Cong., 1st Sess. (1935), p. 11. Tie-in sales have been repeatedly condemned by this Court as monopolistic in purpose and effect. *E. g., International Salt Co.* v. *United States,* 332 U. S. 392. Moreover, since exclusive dealing contracts plainly are prohibited under the Act, and since tie-in agreements may have an even greater anticompetitive effect than exclusive dealing contracts (cf. *Standard Oil Co.* v. *United States,* 337 U. S. 293, 305–306), it would be anomalous if Congress had prohibited the one and sanctioned the other.

The court below also erred, we believe, in holding that, since the Act authorizes suspension or revocation of permits for willful violation, its substantive provisions are to be regarded as penal and therefore to be strictly construed. Regulatory legislation is not to be strictly construed merely because it "may be

the basis of * * * civil proceedings of a preventive or remedial nature * * *." *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U. S. 344, 353. Suspension of the privilege of engaging in a business because of violation of the applicable statutory standards repeatedly has been viewed as remedial rather than penal. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 399; *Cella* v. *United States*, 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016, and cases there cited. In any event, the rule of strict construction does not require that legislation be given "the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U. S. 540, 552.

In sum, we submit that both the language and the legislative history of the Act support the settled view of the agency that the broad provisions of Sections 5 (a) and 5 (b) prohibit tie-in sales.[6] Although those sections were based upon the NRA Code, they were not a mere reenactment thereof (as

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[6] The court below found the administrative construction of the Act unpersuasive because of a 1947 letter by the Acting Secretary of the Treasury which stated that the Department had settled a number of proceedings instituted against wholesalers in 1946 for having made tie-in sales because of its "doubt" as to "whether violations of the statute could be established through the 'tie-in' sale" (see *infra*, p. 15). As the letter shows, however, the Department's "doubt" was based on the fact that members of the industry had contended that the Act did not prohibit tie-in sales. Such an expression of opinion by the Department is not dispositive of the meaning of the statute. Cf. *Southern Goods Corp.* v. *Bowles*, 158 F. 2d 587, 590 (C. A. 4).

the court of appeals treated them) but, we believe, were intended to extend the Code prohibitions to outlaw other anticompetitive practices, such as tie-in sales, which tend to further monopolistic tendencies in the alcoholic beverage industry. See De Ganahl, *Trade Practice and Price Control in the Alcohol Beverage Industry*, 7 Law and Contemporary Problems 665. This construction is "eminently reasonable in the light of the over-all purposes of this regulatory statute." *Distilled Brands* v. *Dunigan, supra*, p. 870.

2. The question whether tie-in sales are prohibited by Sections 5 (a) and 5 (b) is an important one in the administration of the Act. Although tie-in sales occur mostly in times of general shortages in the liquor industry (as was the case in 1946 and 1951, when widespread tie-in sales occurred), they also may arise whenever demand for particular products or brands exceeds supply.[7] Even today, when liquor is relatively plentiful, tie-in sales involving particular brands have been reported to the Alcohol and Tobacco Tax Division. The question thus is one of continuing significance, and proper administration of the Act will be handicapped unless the conflict as to the legality of the practice is resolved by this Court.

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[7] The shortage may be either at the distiller or wholesaler level. Moreover, a wholesaler in a particular area may be in a position to create an artificial shortage by holding back on a particular product or brand.

## CONCLUSION

The decision below is in direct and express conflict with that of another court of appeals, and the case presents an important question in the administration of the Federal Alcohol Administration Act. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
*Solicitor General.*
VICTOR R. HANSEN,
*Assistant Attorney General.*
DANIEL M. FRIEDMAN,
*Attorney.*

AUGUST 1956.

## APPENDIX

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In the United States Court of Appeals for the Fifth Circuit

No. 14914

MAGNOLIA LIQUOR COMPANY, INC., APPELLANT

*versus*

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL & TOBACCO TAX DIVISION, (DALLAS REGION) INTERNAL REVENUE SERVICE, APPELLEE

Appeal from Administrative Ruling Pursuant to Alcohol Administration Act

(April 6, 1956.)

Before BORAH and JONES, Circuit Judges, and DAWKINS, District Judge.

JONES, Circuit Judge: The appellant, Magnolia Liquor Company, Inc., is a wholesale liquor dealer in New Orleans, Louisiana, holding a wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U. S. C. A. § 201 et seq. Included in the Act are provisions relating to unlawful practices which, in part, are:

> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:
>
> (a) Exclusive outlet. To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such

person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house." To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: * * * (7) by requiring the retailer to take and dispose of a certain quota of any of such products; * * *." 27 U. S. C. A. § 205.

Proceedings were instituted against the appellant charging it with violation of Section 5 of the Act in requiring certain named customers to purchase gin, Seagram's 7-Crown blended whiskey, or cordials in order to obtain Johnny Walker Scotch whiskey or Seagram's V. O. Canadian whiskey. Sales so made are referred to as "tie-in sales". It was also charged

that appellant was remiss in keeping required records. Hearings were had before an examiner who held that the appellant had violated the Act as set forth in both of the charges. The examiner recommended a suspension of appellant's permit for 45 days. An appeal was taken to the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service who affirmed the findings as to the tie-in sale violation and reversed the examiner on the infraction of the record keeping requirements. The Director reduced the period of suspension to 15 days. The Assistant Regional Commissioner issued a suspension order from which this appeal was taken.

The appellant is the exclusive wholesale distributor in New Orleans for Seagram Distillers Corporation. Of twenty-eight retail liquor dealers interviewed by a Special Investigator of the Alcohol and Tobacco Tax Division eight were called as witnesses. Of these, seven gave testimony from which the Examiner found that they had bought plentiful items in order to get the scarce items. The Investigator testified that, in his effort to ascertain whether appellant was tieing V. O. with gin and other products, he picked out isolated invoices for the purpose of demonstrating a pattern. Some of the witnesses testified that they had to buy Seagram's 7-Crown whiskey or Seagram's gin to get V. O. or Johnny Walker. One witness said he was required to buy Seagram's gin in order to get 7-Crown. During the period involved, December, 1950, January, February and March, 1951, the appellant sold 7,067 cases of V. O., 29,049 cases of 7-Crown and 2,050 cases of Seagram's Gin. The volume of these items in the so-called tie-in sales was 26 cases of V. O., 5 cases of Scotch, 64¼ cases of 7-Crown and 12 cases of gin.

In 1946 an order to show cause had been issued to appellant charging tie-in sales. A stipulation between

the Alcohol and Tobacco Tax Division and appellant continued indefinitely the hearing on the order to show cause and in the stipulation appellant agreed not to violate "Sections 5 (a) and/or (b)" of the Act. The stipulation provided that it "should not constitute an admission of liability by the respondent [appellant], nor the signing thereof prejudice the legal rights of either party in this, or any further proceedings." The Examiner first excluded this stipulation and later admitted it for the limited purpose of showing that the conduct of appellant was willful. The Director stated that he gave no consideration to the stipulation.

In 1947, The Acting Secretary of the Treasury, in a letter to the President Pro Tempore of the Senate, stated that the Department had concluded that tie-in sales violated Sections 5 (a) and 5 (b) of the Act where the transactions were of a nature to affect interstate commerce. The letter recited that numerous proceedings had been instituted with the result that many suppliers agreed to discontinue such practices. In the letter it was then said:

> This disposition of the cases was due to doubt on the part of the Department as to whether violations of the statute could be established through the "tie-in" sales. It was contended by members of the industry that "tie-in" sales were not within the purview of sections 5 (a) and 5 (b) and that those sections were designed to prevent the creation of exclusive outlets and tied houses only.

The Acting Secretary proposed to amend the Act by adding to Section 5 (c) the words "by conditioning the purchase with the purchase of any other distilled spirits, wine, or malt beverages." On two occasions bills were introduced in Congress which

would have expressly prohibited tie-in sales. Neither measure passed.

The appellant here contends:

1. That tie-in sales are not prohibited;
2. That tie-in sales have not been proved;
3. That the proof does not show a practice of tie-in sales "to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce";
4. That there was no "willful" violation of the Act;
5. That the suspension of appellant's permit constituted a taking of property without due process of law;
6. That the regulation of trade practices between a wholesaler and retailers of alcoholic beverages violates the Twenty-first Amendment to the United States Constitution; and
7. The sanction imposed is excessive.

Before the adoption of the Eighteenth Amendment to the Federal Constitution, the activities of the Federal Government in the regulation and control of the alcoholic beverage industry had to do with the collection of revenues. During the era of prohibition the saloon gave way to the speakeasy, importing became rum-running, and bootlegging acquired respectability of a sort. The Congress enacted the Volstead Act and undertook by criminal penalties to enforce the constitutional proscription. With the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment, the Federal Government undertook, in addition to imposing taxes in the manufacture and sale of liquor, measures intended to eliminate some of the social and political evils which brought on prohibition and those which later resulted in repeal. In the Proclamation of President

Roosevelt of December 5, 1933, declaring that the Eighteenth Amendment had been repealed, the new policy of the Federal Government was thus stated:

> The policy of the Government will be to see to it that the social and political evils that have existed in the pre-prohibition era shall not be revived nor permitted again to exist. 48 Stat. (1933) 1721.

The Congress was not in session when repeal became effective. The National Industrial Recovery Act, 48 Stat. (1933) 195 had recently been enacted and codes of fair competition were being adopted pursuant to its provisions. The codes relating to alcoholic beverages contained provisions which prohibited agreements by vendors from exacting or requiring that any retailer handle or sell only the products of a particular member of the industry. When Schechter v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947, brought an end to the National Industrial Recovery Act and the operations under it, most of the practices outlawed by the codes and not held to be unconstitutional were brought within the prohibitions of the Federal Alcohol Administration Act, *supra.* As said in the report of the Ways and Means Committee of the House of Representatives:

> The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact. In general, it may be said that the bill incorporates the greater part of the system of Federal control which was enforced by the Government under the codes. H. R. Rep. No. 1542, 74th Cong. 1st Sess. (1935).

It is urged that the Act goes beyond the provisions of the codes. Our initial query is whether the Act pro-

hibits, as the codes did not, the so-called tie-in sales. The only case upon this rather narrow question is *Distilled Brands, Inc.* v. *Dunigan,* 2d Cir. 1955, 222 F. 2d 867, where it was held that tie-in sales were violations of § 5 of the Act. There a wholesaler had purchased a package deal of Scotch whiskey and rum and sold it as it had received it by requiring the retailers who wanted the Scotch to buy a proportionate part of the rum. It was shown that 280 such tie-in sales occurred over a period of two months. The court stated that the two major issues were whether the sales resulted in purchases to the exclusion in whole or in part of other sellers and whether they sufficiently affected interstate commerce. In upholding the finding of violations made by the Alcohol and Tobacco Tax Division, the Court said:

> We agree with the position of the Division that tie-in sales do constitute a sufficient interference with competition to require prohibition within the regulatory scheme of the Federal Alcohol Administration Act, and that § 5, 27 U. S. C. § 205, actually covers such transactions. The Supreme Court has repeatedly characterized tie-in sales as monopolistic in purpose and effect. International Salt Co. v. United States, 332 U. S. 392, 68 S. Ct. 12, 92 L. Ed. 20; Standard Oil Co. of California v. United States, 337 U. S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371. Their restraint on commerce is twofold: The buyer is coerced into accepting a product which he would otherwise not have purchased; and other sellers of the tied-in product are to that extent excluded from the market. These two concomitants of the tie-in sale are dealt with separately in § 5, subsection (a), looking toward the effect on the excluded seller, and subsection (b), concerning itself with coercion of the buyer. Both subsections explicitly state that the forbidden practices need not result in com-

plete exclusion of competitive sellers, but that partial interference will suffice.

Petitioner urges us to limit the statutory prohibition on partial interference to the situation where the wholesaler controls only some of the various kinds of liquors in which the retailer deals, leaving him free to shop around for the others. Thus petitioner suggests that it would be liable if it had prevented the retailers with whom it dealt from buying any whiskey or rum from other wholesalers, but that it is not liable when it only reduces their purchases of other rums. We see no reason so to limit the statute. The broader reading given to § 5 by the administrative tribunal below is in accordance with the construction put thereon by the Treasury Department since 1946. This construction is of considerable weight, particularly when it is so eminently reasonable in the light of the over-all purposes of this regulatory statute. *Distilled Brands, Inc.* v. *Dunigan,* 2d Cir. 1955, 222 F. 2d 867, 869.

While there are, in the case before us, some questions raised as to the facts established by the proofs, for the most part the factual phases are without difficulty. The problem posed is primarily one of statutory construction and application. Several of the well recognized rules of statutory construction should be considered in reaching a proper solution of the question raised by this appeal. As said by Chief Justice Marshall, "Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived". *United States* v. *Fisher,* 2 Cranch 358, 2 L. Ed. 304. The statutory provisions here under scrutiny although not criminal, are penal. Authorization is given to the Secretary of the Treasury to revoke, suspend or annul the permit which the Act requires as a condition to carrying on business. 27 U. S. C. A. §§ 203, 204. A statute which au-

thorizes the sanction of business cessation is indeed penal. For a comment upon the rule by which such laws are to be construed we again turn to Chief Justice Marshall and find the following: "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself". *United States* v. *Wiltberger,* 5 Wheat. 76, 5 L. Ed. 37. See *Tiffany* v. *Missouri National Bank,* 18 Wall. 409, 21 L. Ed. 862; *Providence Steam-Engine Co.* v. *Hubbard,* 101 U. S. 188, 25 L. Ed. 786.

It may be noted that in the congressional enactment of § 5, the sub-sections were supplied with titles. The heading of § 5 (a) is "Exclusive outlet", and that of § 5 (b) is " 'Tied house' ". The heading of a section of a statute, while not conclusive, is proper to be considered in interpreting the statute where ambiguity exists. *Knowlton* v. *Moore,* 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969; *Maguire* v. *Commissioner of Int. Revenue,* 313 U. S. 1, 61 S. Ct. 789, 85 L. Ed. 1149. This rule, like many other rules of statutory construction, is inapplicable where there is no textual ambiguity. *United States* v. *Minken,* 350 U. S. 179, — S. Ct. —, 100 L. Ed. (Adv. p. 191). Tie-in sales do not, of couse, and no contention is made that they do, come within the ban against exclusive outlets and tied houses.

Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to the reports of congressional committees which have considered the matter. See *Wright* v. *Mountain Trust Bank,* 300 U. S. 440, 57 S. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455, and authorities there cited. Constructing the Act strictly against the Government as we think we must do, and looking to the intent of the Congress as disclosed by the committee report from which we have quoted, we cannot say that the Act prohibited or was intended to prohibit tie-in sales

The contemporaneous construction of a statute by an administative agency charged with the duty of enforcement is entitled to respectful consideration. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 55 S. Ct. 323, 79 L. Ed. 780. Here we have the Alcohol and Tobacco Tax Division construing the Act in 1946 as prohibiting tie-in sales. But the Division had no such confidence then in its interpretation as to seek enforcement by sanctions. Instead, it sought stipulations. It confessed its doubt as to whether violations could be established through tie-in sales. It recognized the contention of members of the industry that tie-in sales were not prohibited. It sought to have the doubt resolved by an amendment to the Act bringing tie-in sales within the prohibited practices. The Congress did not see fit to grant the administrative request. Counsel for the Government say to us that the simple introduction of a bill to amend a statute, without any further proceedings thereon, "is without meaning for the purposes of statutory interpretation" citing *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 67 S. Ct. 405, 91 L. Ed. 471. A recognition of such a principle would not preclude us, in our "labors to discover the design" of the framers of the Act from seizing upon the expressed doubts of the Treasury Department as an aid to construction. The Division recognized that the language of § 5 was ambiguous by not attempting, in 1946, to apply the sanctions of the Act to those making tie-in sales. There was a further recognition of the ambiguity in the letter from the Acting Secretary to the President Pro Tempore of the Senate. The doubt which was then recognized by the Treasury Department and its Alcohol and Tobacco Tax Division has not been dispelled from our minds. We resolve that doubt in favor of the appellant and hold that the Act does not prohibit tie-in sales.

The opinion in *Distilled Brands* v. *Dunigan, supra*, gives to § 5 the "broader reading" of the administrative tribunal, and finds such to be in accord with "the construction put thereon by the Treasury Department since 1946". Since it does not appear from the opinion in the Distilled Brands case that the letter of the Acting Secretary was before the court, we assume that the court was entitled to find from the evidence before it that there had been a continuous and confident administrative construction consonant with its contention there and here asserted.

The appellant, in addition to its contention that tie-in sales are not prohibited by the Act, urges other grounds for reversal. Some of these, we think, have merit but the view which we have taken makes a determination of them unnecessary.

The order suspending the permit of appellant is set aside and

*Reversed.*

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*Judgment*

Extract from the Minutes of April 6, 1956

No. 14914

MAGNOLIA LIQUOR COMPANY, INC.

*versus*

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL & TOBACCO TAX DIVISION, (DALLAS REGION) INTERNAL REVENUE SERVICE

This cause came on to be heard on the petition of Magnolia Liquor Company, Inc., for appeal from an Administrative Order issued by the Assistant Regional Commissioner, Alcohol & Tobacco Tax Division, (Dallas Region) Internal Revenue Service, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the order of the said Assistant Regional Commissioner suspending the permit of appellant in this cause be, and the same is hereby, set aside and reversed.

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In the United States Court of Appeals for the Fifth Circuit

No. 14914

MAGNOLIA LIQUOR COMPANY, INC., APPELLANT

*vs.*

CLAUD B. COOPER, ASSISTANT REGIONAL COMMISSIONER, ALCOHOL & TOBACCO TAX DIVISION (DALLAS REGION) INTERNAL REVENUE SERVICE, APPELLEE

*Order*

(August 18, 1956)

Before BORAH and JONES, Circuit Judges, and DAWKINS, District Judge.

BY THE COURT: By motion of the appellee herein it is shown that while the appeal in this Court was pending, Claud B. Cooper, as Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, retired from that office on January 31, 1954, and was succeeded by Joseph F. Black on February 1, 1954; and judgment of this Court was thereafter entered on April 6, 1956, without substitution of Joseph F. Black for Claud B. Cooper as a party to this appeal; and it appearing from said motion that it is desired that a petition for certiorari in the Supreme Court of the United States be filed, by reason whereof it is desired that said judgment be recalled and Joseph F. Black be substituted for Claud B. Cooper; and that such

other provisions be made by order as may be required; therefore, be it

Ordered, that the judgment of this Court in this cause bearing date April 6, 1956, be and it is hereby recalled;

That Joseph F. Black, Assistant Regional Commissioner, Alcohol and Tobacco Tax Division (Dallas Region), Internal Revenue Service, be and he is hereby substituted as a party appellee in this cause on appeal for and in lieu of Claud B. Cooper, nunc pro tunc as of February 1, 1954;

That the opinion of this Court bearing date April 6, 1956, be and it is hereby affirmed and approved as of the date thereof;

That judgment be entered pursuant to the aforesaid opinion against the said Joseph F. Black, Assistant Regional Commissioner as aforesaid, nunc pro tunc as of April 6, 1956;

That the time for the filing in the Supreme Court of the United States of a petition for a writ of certiorari in the above entitled cause shall be and hereby is extended to and including September 3, 1956;

That execution upon the judgment of this Court in this cause shall be and hereby is stayed until and including September 3, 1956, pending the filing of a petition in the Supreme Court for a writ of certiorari; and if said petition be so filed, the execution of said judgment shall automatically remain stayed until the Supreme Court shall act upon said petition for certiorari; and

That the suspension order of the aforesaid Assistant Regional Commissioner against Magnolia Liquor Company, Inc., dated November 30, 1953, directing the suspension of its wholesaler's basic permit issued under the Federal Alcohol Administration Act, shall not be enforced pending the time

for the filing of a petition for certiorari in the Supreme Court, nor thereafter unless and until the judgment of this Court to be entered herein shall be reversed by the Supreme Court.

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Supreme Court of the United States

No. —, October Term, 1956

ASSISTANT REGIONAL COMMISSIONER, ALCOHOL AND TOBACCO TAX DIVISION (DALLAS REGION), INTERNAL REVENUE SERVICE, PETITIONER

*vs.*

MAGNOLIA LIQUOR COMPANY, INC.

*Order Extending Time to File Petition for Writ of Certiorari*

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and includir September 3, 1956.

(sgd) Hugo L. Black,
*Associate Justice of the*
*Supreme Court of the United States.*

Dated this 2nd day of July, 1956.

U. S. GOVERNMENT PRINTING OFFICE 1956